

**Lopez v Board of Educ. of the City Sch. Dist. of the  
City of N.Y.**

2023 NY Slip Op 30429(U)

February 8, 2023

Supreme Court, New York County

Docket Number: Index No. 652451/2022

Judge: Lyle E. Frank

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYLE E. FRANK PART 11M

Justice

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LEOBARDO LOPEZ,

Petitioner,

- v -

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK, DAVID C
BANKS, TIMOTHY TAYLOR

Respondent.

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INDEX NO. 652451/2022

MOTION DATE 08/01/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Petitioner, a former tenured elementary school teacher employed by the New York City Department of Education (the "DOE"), seeks an order pursuant to CPLR §7511<sup>1</sup> to vacate the award and opinion dated July 5, 2022, of Arbitrator Timothy S. Taylor of the American Arbitration Association. On July 5, 2022, the Arbitrator submitted his award together with his opinion, that the appropriate penalty for Mr. Lopez's disciplinary charges was termination of employment. Respondents cross-move to dismiss the complaint, alleging that petitioner has failed to establish any basis for vacating the award and that the penalty imposed does not shock one's sense of fairness. For the reasons set forth below the petition is denied and respondents' cross-motion is granted.

<sup>1</sup> The Court would like to thank Sarah Silbowitz for her assistance in this matter.

### Background

Petitioner began his employment with the DOE in 2010, as a paraprofessional and in 2012 became an elementary school teacher. Since 2016, Petitioner was assigned to P.S. 311, Lucero Elementary School, a dual language school.

On June 15, 2019, the DOE issued Charges and Specifications against petitioner for allegations related to his time and attendance during the 2016-2017, 2017-2018, and 2018-2019 school years, including excessive absences, tardiness, neglect of his duty, and engagement in conduct unbecoming his profession.

Petitioner argued that his HIV disease, anxiety, depression, substance abuse, and period of homelessness contributed to his excessive lateness and absences, neglect of his duty, and unprofessional conduct. Furthermore, petitioner maintained that after a relapse, he sought help once more and became drug-free with impeccable attendance at the school. Considering the evidence provided, Arbitrator Taylor found that the DOE met its burden of proof establishing petitioner's guilt on Specifications 1, 2, 3, 4, and 6, which caused a disruptive and negative impact on his workplace.

Additionally, while petitioner provided testimony and paperwork to demonstrate his sobriety, Arbitrator Taylor found that petitioner did not provide independent sources of medical or therapeutic evidence of his recovery and sobriety, thus failing to sufficiently mitigate against the penalty of termination. Lastly, petitioner testified that when he did attend school, he was unable to function. Arbitrator Taylor found that Petitioner "utterly failed to provide direct educational services to students" and that "his students deserved better."

### Applicable Law

Pursuant to CPLR §7511(b)(1), an arbitration award can be vacated or modified on the grounds that:

- (i) corruption, fraud, or misconduct in procuring the award;
- (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession;
- (iii) an arbitrator, or agency, or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
- (iv) failure to follow the procedure of this article. unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.

CPLR § 7511(b)(1).

To be upheld, the award must have evidentiary support or other basis in reason, appear in the record, and not be arbitrary or capricious (*Motor Veh. Acc. Indem. Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 214 [1996]; *Mount St. Mary's Hosp. v Catherwood*, 26 NY2d 493 [1970]). The standard of review of a penalty imposed after a hearing is whether the punishment is so disproportionate to the offenses as to be shocking to the court's sense of fairness (*Lackow v Dept. of Educ. (or "Bd.") of the City of NY*, 51 AD3d 563 [1st Dept 2008] citing, *Pell v Bd. of Educ.*, 34 NY2d 222 [1974]). "An award is not arbitrary and capricious or irrational simply because there are differing views as to the appropriate sanction." (*Matter of Bolt v NY City Dept. of Educ.*, 30 NY3d 1065, 1069 [2018]).

The Court of Appeals has held that termination of employment does not 'shock the conscience' when an employee has an otherwise unblemished career. *See, id.*; *Matter of Ward v City of New York* 23 NY3d 1046 [2014]; *Matter of Lozinak v. Board of Educ. Of the Williamsville Cent. Sch. Dist.* 24 NY3d 1048. Further, it should be noted that upon determining whether the penalty imposed "exceeds the bounds of acceptable punishment" the court should

not replace the judgment of the arbitrator with its own. (*Bolt* 30 NY3d 1065 at 1071, citing *Pell v Bd. of Educ.*, 34 NY2d 222 [1974]).

In support of the petition, petitioner contends that his termination was based, in part, on his admitted drug abuse. Petitioner cites to the arbitration decision wherein Arbitrator Taylor states “[h]is misconduct and drug abuse make him unfit to teach, making termination the appropriate penalty”, the Court does not find this statement to suggest that petitioner’s drug use as being the basis for his termination. The arbitrator’s decision, as well as the award, specifies the specific conduct alleged and the finding as to each specification, thus the Court rejects petitioner’s contention that his drug abuse was an additional specification for which petitioner was not afforded due process. To the contrary, petitioner raised the issue of drug abuse in an attempt to mitigate the penalty of termination; the arbitrator properly addressed that issue and reported his findings.

Based on the foregoing, this Court finds that Arbitrator Taylor’s findings and determination that termination was warranted was deliberative, comprehensive, well-reasoned, supported by the record, and does not “shock the conscious”. Accordingly, the petition is denied, the cross-motion to dismiss is granted and the proceeding is hereby dismissed.

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2/8/2023  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	OTHER
<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: